INSOLVENCY AND SPECIFIC PERFORMANCE

THOUGH the fact of the insolvency of one of the parties to a suit in equity is generally conceded to have a very material bearing upon the question of the granting or refusing of relief, many courts express considerable doubt as to whether the defendant's inability to satisfy a judgment rendered against him is sufficient ground upon which equity may take jurisdiction to grant specific performance.

The adjudged cases may be placed roughly in three groups: (1) those taking the view that, if damages can be accurately estimated, the legal remedy should be considered adequate and specific performance refused though the defendant is insolvent so that damages may be uncollectible;[1] (2) those holding that insolvency alone is a sufficient basis on which equity may act, considering that the legal remedy is inadequate if it does not yield substantial results;[2] (3) and those taking the view that, though insolvency alone will not give jurisdiction, it may, nevertheless, when combined with other matters of equitable cognizance, "become a potent or even controlling factor in determining the fact of jurisdiction."[3]

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[1] McLaughlin *v.* Piatti, 27 Cal. 451; Hendry *v.* Whidden, 48 Fla. 268, 37 So. 571; Cincinnati, etc. R. R. Co. *v.* Washburn, 25 Ind. 259; Lasar *v.* Baldridge, 32 Mo. App. 362; Gillett *v.* Warren, 10 N. Mex. 523, 62 Pac. 975.

[2] Doloret *v.* Rothschild, 1 Sim. & St. 590; Dilburn *v.* Youngblood, 85 Ala. 449, 5 So. 175; Clark *v.* Flint, 22 Pick. 231; Avery *v.* Ryan, 74 Wis. 591, 43 N. W. 317.

[3] In several of the cases most often quoted for this proposition there either appears, in fact, no other ground upon which equity could act, or, the additional ground suggested is untenable. In Livesley *v.* Johntson, 45 Ore. 30, 76 Pac. 13, 946, the court said that the agreement gave rise to a trust relationship, but no such situation appears in the case. One party advanced money for the cultivation and gathering of a crop of hops grown on the land of the other, a part of which crop was to be sold to the party making the advances. In Livesley *v.* Heise, 45 Ore. 148, 76 Pac. 952, arising under a similar contract, the court relying upon Livesley *v.* Johntson, *supra*, said that "in addition to the idea of a joint venture" there was a "clear ground for equitable intervention to require specific performance to deliver the hops, which consists in the alleged fraudulent collusion of the parties defendant, entered into with a view on the part of A. Heise to avoid his obligations to the plaintiffs under the contract." It is difficult to see why failure to perform coupled with fraudulent intent should give equity jurisdiction any more than failure to perform for any other reason.

Ridenbaugh *v.* Thayer, 10 Idaho, 662, 80 Pac. 229, also relying upon Livesley *v.*

When the goods which are the subject matter of the contract are not unique and the plaintiff's situation with reference to them is in no way special or peculiar, the legal remedy affording a recovery of a money judgment is ordinarily quite adequate. But when the defendant is insolvent,[4] or in such financial condition that as a practical matter the judgment so rendered would be uncollectible, it is hardly a sufficient answer to the party asking relief to tell him that the forms of legal procedure provided are perfect for determining with accuracy the damage which he has suffered, though the remedy thus provided will yield him no actual returns.[5] The jurisdiction of equity being founded upon the inadequacy of the legal remedy in the particular case before the court, what constitutes such inadequacy ought to be a matter of fact rather than of theory.

Though the recovery of damages is a complete and adequate remedy in the case of a bargain for goods of an ordinary kind, yet the legal remedy affords an adequate relief only when the damages themselves, and not merely a judgment for them, can actually be secured.[6] The proper test of the adequacy of the legal remedy in any case is, whether the plaintiff can take the sum of money recovered, and with it put himself in the same situation as if the contract had been kept.[7] Clearly, when goods are unique in character this cannot be done, as the very character of the goods makes it impossible to replace them with any sum of money; hence equity has jurisdiction

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Johntson, *supra*, fails to show any other ground for equitable relief. Complainant made large advances on a contract for the purchase of 2,500 cords of wood. The fact that unless specific performance was decreed the wood might be lost to both parties, merely shows the necessity of equitable relief because of insolvency, rather than any independent ground of equity jurisdiction.

[4] Insolvency in this connection should be taken to mean nothing more than inability to satisfy a judgment which might be rendered. In Hogg *v.* McGuffin, 67 W. Va. 456, 68 S. E. 41, the defendant appears only to be "execution-proof." But the mere allegation of insolvency, or the apprehension of it, should not induce the court to act. Strang *v.* Richmond, etc. R. R. Co., 93 Fed. 71.

[5] McLaughlin *v.* Piatti, 27 Cal. 451; United, etc. Co. *v.* Hoppock, 28 N. J. Eq. 261; Heilman *v.* Union Canal Co., 37 Pa. St. 100. POMEROY, EQUITY JURISPRUDENCE, vol. 6, § 749, note 30, says: "The inadequacy of the legal relief which is the basis of equitable remedies is ordinarily in the nature of that relief in cases of a certain type, not in the difficulty of collection of damages in the individual instance." See also FRY, SPECIFIC PERFORMANCE, § 65.

[6] Glassbrenner *v.* Groulik, 110 Wis. 402, 85 N. W. 962.

[7] Ridenbaugh *v.* Thayer, 10 Idaho, 662, 80 Pac. 229; Butterick Publishing Co. *v.* Fisher, 203 Mass. 122, 89 N. E. 189; New England Box Co. *v.* Prentiss, 75 N. H. 246, 72 Atl. 826; Livesley *v.* Johntson, 45 Ore. 30, 76 Pac. 13, 946.

and may grant relief. But if the defendant is insolvent, or a judgment against him cannot be satisfied, any legal remedy against the defendant is just as inadequate, no matter how perfect the procedure may be for the discovery of the exact amount due.

The goods being in no way unique or peculiar, is it a sufficient reason for giving specific performance to a buyer, who has advanced the purchase price, that he cannot recover from the seller, because of his insolvency, such a sum of money as will put him in the same position as if the contract had been kept? His remedy is not inadequate because he needs these particular goods, but only because he cannot with the money recoverable from the seller in a law action buy such goods in quality and amount as are called for by his contract.

It has been suggested [8] that one who has thus advanced money to a person now insolvent for which he was to receive goods, is in a position subjecting him to great hardship in that, unless specific performance is granted, he will get neither the goods for which he contracted nor the money which he has advanced; while there is no hardship upon the seller in compelling him to perform, since he would be unjustly enriched if allowed to keep the money without giving up the goods. Nor, it is said, is there any unfairness to the seller's creditors, since they will suffer no hardship if not permitted to share in the money which has been given for the goods; while they would be unjustly enriched at the buyer's expense if specific performance to him was not permitted, in that they would share in both the goods and the money. If this argument is sound there would seem to be no reason for making a distinction between a buyer and a seller, and the argument would apply with as much force in case of a sale of goods to the insolvent person as in the case of a contract for the purchase of goods where the purchase price has been paid.[9] If the buyer in such a situation is not compelled by equity to pay the full purchase price, the seller loses his goods

[8] 18 HARV. L. REV. 454.

[9] A distinction should be drawn between the case of one who advances money on the credit of specific goods or with special reference to being protected from the seller's insolvency, and one who enters into contract relations without such considerations. In the first situation the complainant should be protected, Hurley *v.* A. T. & S. F. Ry., 213 U. S. 126; while in the other case there is a reliance merely upon the general credit of the other party and no reason exists for giving the complainant relief different from that to which all other general creditors are entitled. Columbia, etc. Co. *v.* World's Columbian Exposition, 85 Ill. App. 369.

and does not get the purchase money; while the insolvent buyer secures goods for which he pays nothing and his general creditors are permitted to share in this addition to their debtor's property at the expense of the unfortunate seller.

If the insolvency of the defendant makes the remedy of the plaintiff inadequate when money has been advanced for which title to goods was to be transferred, it must be just as inadequate when goods are transferred to the defendant for which he was to pay money; for, even if money is all that a plaintiff asks, he should be allowed to get it in equity if he is able to show that he cannot recover through the law court the sum to which he is entitled.[10] All creditors of an insolvent debtor who have either advanced goods without getting the purchase price, or advanced the purchase price without getting the goods, are in exactly the same position. In each case and with reference to every creditor of an insolvent debtor, there exists the same situation: the individual creditor will be left with a remedy which will yield little or nothing and at any rate will not put him into the same position as if the contract had been performed, while the debtor and all of his other creditors through him are enriched to the extent of the money or goods which this particular creditor has parted with. Only a money sum is necessary as to either buyer or seller to give complete relief; but because of the defendant's insolvency, the sum of money necessary for complete relief cannot be recovered.

Thus, as to each particular creditor, when the case is viewed only from his view-point, there is a situation which should entitle him to equitable relief, but as relief is quite impossible for every one because of the fact which alone makes the legal remedy inadequate, *i. e.*, that there is not sufficient money to pay the judgments which might be secured, the situation is one where equity must refuse relief to one when such relief would necessarily be given to the prejudice of others who are in exactly similar positions and where obviously it cannot be given to all alike. In many cases where equity properly has jurisdiction and the plaintiff would otherwise be clearly entitled to specific performance, the equity court has refused such relief on the ground that the rights of innocent third persons might be injured,[11] that the rights of the public might be prejudiced,[12] or

[10] "Specific Performance for the Purchase Price," 1 IOWA LAW BULLETIN, 53.

[11] Curran *v.* Holyoke, etc. Co., 116 Mass. 90.

[12] Taylor *v.* F. E. C. Ry. Co., 54 Fla. 635, 45 So. 574; Whalen *v.* B. & O. Ry. Co.,

that a peculiar hardship might be brought upon the defendant,[13] or that the burden upon the defendant may be out of all proportion to the benefits to be derived by the complainant.[14] The equity of the individual complainant is counter-balanced by the equities of others, and the court will consider all interests when giving its relief.

Since each creditor can make out a case for relief exactly similar to that of the party now before the court, and as each has at some time contributed to the enlarging of the defendant's estate, it ought to make no difference whether one claimant got into his unfortunate position sooner or later than another. As equity can and does look ahead to see what effect its action may have upon others, whether they are before the court or not, it must be at once apparent that if an estate can pay out only fifty per cent, if the court proceeds to give specific performance to the creditors whose claims make up the last fifty per cent of the indebtedness, these creditors will be paid in full; while the creditors to whom the debtor incurred the first half of his obligations must give up their property and get nothing whatever in return. Whether we start with the first claims or the last claims and give specific performance because of insolvency, the result must be that the creditors at the other end of the line will get nothing. The logical carrying out of the rule must result not only in the situation where a creditor parts with his money and does not get the goods, or parts with his goods and does not get his money, but also in the still greater hardship upon some of the creditors who having parted with their goods or their money without getting money or goods in return will be able to secure nothing whatever upon any remedy, legal or equitable, which they may wish to pursue; while others similarly situated will have the obligations which are due them completely and specifically performed.

Though the jurisdiction of the court may be perfect, equity in

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108 Md. 11, 69 Atl. 390; Harper *v.* Virginian Ry. Co., 76 W. Va. 788, 86 S. E. 919. Heilman *v.* Union Canal Co., 37 Pa. St. 100, though usually cited for the proposition that insolvency alone is not a basis for equity jurisdiction, involved however the proposition of balance of hardship in that the defendant company was maintaining "an important public thoroughfare," which would be destroyed by granting the complainant's petition to enjoin the defendant's use of water.

[13] Faine *v.* Brown, cited 2 VES. SR. 307, (S. C.) AMES, CASES IN EQUITY, 397.

[14] Clarke *v.* Rochester, etc. R. R. Co., 18 Barb. (N. Y.) 350; Conger *v.* N. Y., etc. R. R. Co., 120 N. Y. 29, 23 N. E. 983.

many situations very properly refuses to exercise it, and on this basis specific performance should not be given to one creditor in his suit against an insolvent defendant when such relief would result to the prejudice of other creditors occupying similar positions and who are equally entitled to relief.[15]

The contract may, however, be of such a character that the rights or interests of third persons would in no way be affected by compelling performance to the complainant, as, for example, where the question involved is to make the defendant sell his goods or perform his obligations to the complainant rather than to allow him to deal with some one else to whom he is under no obligation,[16] or to observe a negative agreement, the breach of which would injure the complainant and is of no concern to any other person.[17] It may also happen that the complainant is the only creditor of the insolvent defendant, so that no third person can be injured by the giving of equitable relief. If the legal remedy in such a situation is inadequate, equity should give relief by way of specific performance. Thus, if the plaintiff is the only creditor and has advanced money to the defendant, and the defendant then squanders the money and has no other property available, a judgment against him would remain unsatisfied unless the very goods bargained to be sold might be levied upon to satisfy the judgment. If they would be sufficient and available for this purpose, then it would seem that the legal remedy would for all practical purposes be as adequate as the equitable one, since the plaintiff does not require these particular goods but only to be put into a position where he can secure similar goods.

However, it might happen in such a situation that the legal remedy would be inadequate in the case where money is advanced for goods, and might easily be inadequate where goods have been advanced without getting payment of the money, for the creditor may not be able to find the goods or the money which may be levied upon to satisfy any judgment which may be rendered. Furthermore, an equitable remedy might be more effective than a legal one in pre-

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[15] Roundtree *v.* McLain, 4 Hempst. 245; City Fire Ins. Co. *v.* Olmsted, 33 Conn. 476; Munger *v.* Albany, etc. Bank, 85 N. Y. 580; Chaffee *v.* Sprague, 16 R. I. 189, 13 Atl. 121.

[16] Texas Co. *v.* Central, etc. Co., 194 Fed. 1; Great Lakes, etc. Co. *v.* Scranton Coal Co., 239 Fed. 603.

[17] Zimmermann *v.* Gerzog, 13 N. Y. App. Div. 210; Petrolia Mfg. Co. *v.* Jenkins, 51 N. Y. Supp. 1028; Beeman Bros. *v.* Hexter, 98 Iowa, 378, 67 N. W. 270.

venting the debtor from putting himself in a position where he cannot perform his obligation to pay a judgment.[18] So also the goods may be so located as to put too great a hardship upon a creditor to make his rights depend upon the seizure of the debtor's goods.[19] Likewise, the property bargained to be sold may be exempt from legal process,[20] or the plaintiff may not know what property the defendant has, nor where the property may be found, and hence the legal remedy might be worth but little, while the equitable remedy would give full and complete relief.

Even though there may be other creditors to whom the debtor owes small amounts the situation may be such that no practical question involving the settlement and distribution of the debtor's assets is raised. The debtor may belong to the class of those who cannot be forced into involuntary bankruptcy; and hence, if he does not raise the question, there may be no reason why equity should not give specific performance to the creditor asking relief who makes a showing of the necessity thereof in his special case.[21] His other indebtednesses may be for only trifling amounts, and as he cannot be forced into bankruptcy involuntarily he may pay such debts as he wishes and his other creditors cannot object to his so doing. Therefore, if he is compelled to perform his obligation to the complainant his other creditors are not injured any more than if he made such payment voluntarily. It is for the defendant to insist upon a distribution of his estate to all creditors if he so wishes, but there is nothing in the Bankruptcy Act which permits him to merely refuse to perform his obligations or pay his debts, unless a distribution of his assets takes place under the term of the Act. In such a case equity is not changing in any way the defendant's rights or obligations, but is merely furnishing a remedy for the complainant by which he may compel performance from a debtor who is in default. If the defendant does not wish to perform, or wishes to

[18] Ridenbaugh *v.* Thayer, 10 Idaho, 662, 80 Pac. 229.

[19] McNamara *v.* Home, etc. Co., 105 Fed. 202. Here the complainant seems to be the only creditor of a foreign corporation whose property within the state was barely enough to fulfil its contract with the complainant; while the property itself, cattle running at large on the range, was such that any attempt to attach or levy upon it would have been very burdensome and ineffective.

[20] Faraday, etc. Co. *v.* Owens, 26 Ky. Law Rep. 243, 80 S. W. 1171. Contract for the conveyance of a homestead. Vendor not allowed to set up the homestead character of the property in a suit for specific performance by the purchaser.

[21] Parker *v.* Garrison, 61 Ill. 250.

treat all of his creditors alike, he has the option of filing a petition in bankruptcy to accomplish this purpose. Since it lies with the defendant, and not his creditors, to say whether there shall be a *pro rata* distribution of the defendant's estate, the protection of the rights of other creditors does not require that equity should refuse the complainant the relief for which he asks.

From a practical standpoint the situation may be the same even though the debtor be not of the class exempt from involuntary bankruptcy. If the claims other than the complainants' are only for an inconsiderable amount, the practical difficulty of collecting a claim for five dollars or for five thousand dollars is very different; and the mere possibility of injury to these other claimants may not be sufficient or material enough to prevent equity from giving relief to one who very much needs it, at least, unless the parties concerned make known their objections. If the defendant is forced into bankruptcy within the proper time, the preference given through the equity court will be overcome the same as any preference which might be gained by any creditor in the law court. But the creditors for small amounts may prefer to trust to the general credit of their debtor and his ability to pay at a later time, and the possibility that they will enforce equal distribution of the debtor's estate may be so remote that this fact alone ought not to deter equity from giving aid to the party asking for and needing its relief.

That equity might very properly have taken jurisdiction for the purposes of effecting equality in the distribution of the property of insolvent debtors seems clear from a consideration of other situations where the principle of equality has been recognized and equity has taken care that all persons similarly situated should be treated in the same manner and that no one should gain a preference and no one be compelled to bear more than his share of the burden. Wherever it is at present possible to act upon this principle, equity will do so.[22] It is quite probable that the early enactment of bank-

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[22] GLENN, CREDITORS' RIGHTS AND REMEDIES, § 295; ". . . there is only one principle on which a Court of Chancery can act by way of liquidation. That principle may be invoked whenever, by operation of law or agreement, there exists a limited fund dedicated to the payment of debts, whether of one sort or another. In any such case, the actual or probable insufficiency of the fund completely to meet the purpose for which it was intended will induce the court to take jurisdiction over it, and actuate its disposition under the direction, or by the hands of, an officer of the court. That is a well established branch of the court's jurisdiction, however lacking may have

ruptcy and insolvency laws, the first one passed in 1542, the administration of which was originally given over to the Chancellor, may have prevented equity from developing jurisdiction in order to insure an equitable distribution of an insolvent debtor's property.

But the fact that equity may have been prevented from taking jurisdiction for this purpose has in no way prevented the recognition of the general principle that equality is equity, or have obscured this principle in reference to cases now taken care of through bankruptcy and insolvency statutes. Therefore, even though equity has not taken jurisdiction to promote equality among creditors, it should not, on the other hand, take any action to give preference to one creditor over another and thus work against the equitable idea of equality. An exception, which is apparent rather than real, is where equity is called upon to aid a legal process as, for instance, to subject goods to levy which cannot be reached at law; but it must be borne in mind that this relief is merely following and aiding the legal process rather than granting any remedy of its own, and in so far as equity is called upon to act in such cases it follows the law in that it applies to property, which could be made available in equity only, the same rules as were applied to property made available at law, *i. e.*, it was used only to get property and not to make a distribution of it.[23]

Since business could not wait upon the development of either law or equity, mercantile necessity brought out the bankruptcy legislation, thus forestalling, probably, the application of the principle of equality which equity has applied in many other situations. The marshalling of assets, the right of a creditor to bring a bill against the representative of a deceased debtor,[24] the administration of the assets of an insolvent corporation or limited partnership,[25] and cases of contribution in suretyship [26] are all further illustrations of the protection which equity gives to insure that all persons similarly situated be treated equally and fairly.

Though insolvency of a debtor as a basis of granting specific per-

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been the chancellors in the exposition of its basis. But that there is such a jurisdiction cannot be doubted."

[23] GLENN, CREDITORS' RIGHTS AND REMEDIES, § 16; ". . . the equity court was acting in the whole matter purely in aid of the legal right to payment evidenced by judgment. . . ."

[24] LANGDELL, EQUITY JURISDICTION, 125.

[25] GLENN, CREDITORS' RIGHTS AND REMEDIES, § 308.

[26] POMEROY, EQUITY, vol. 1, §§ 407, 411.

formance to one creditor in disregard of the rights of others similarly situated is undoubtedly against the spirit of the Bankruptcy Act,[27] such relief is also opposed to the fundamental principles upon which the equity court acts in all other situations where its relief is dependent upon the question whether it can be granted without doing harm to third persons: it is submitted that this general principle of equity would apply and prevent relief where the rights of other creditors would be prejudiced even in the absence of any special legislation upon the subject.

The conclusion to which we must then come, if insolvency is a basis for specific performance in any case, is that all persons to whom the insolvent owes obligations are entitled to specific performance, or to some sort of relief which is equitable in its nature. But where there are many creditors who are all practically in the same situation specific performance is obviously impossible, since all cannot be paid in full and there is no reason for preferring one creditor over the others or giving preference to one class of obligations merely because goods were to be given rather than money. In each case, though the legal remedy would under normal circumstances give adequate relief, this remedy is of but little value here because of the insolvency of the defendant. The relief which is needed is not specific performance of any particular obligation, but rather an equal distribution of assets to all persons having similar claims which cannot be paid in full. But, though the administration of this equitable principle has been largely taken over through bankruptcy and insolvency proceedings and the assumption of jurisdiction by the court of equity for this purpose has been forestalled, equity will at least see to it that by its action it does not prevent or hamper the action o the court which has been specially created to administer these equitable principles.

In cases involving threatened injury to property the courts seem to have had but little hesitation in allowing equitable relief where the defendant is insolvent, and in general have recognized the principle that the adequacy of the remedy is not a matter of the forms of procedure but of the actual results which the plaintiff may secure through the recovery and satisfaction of a judgment.[28] If

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[27] WILLISTON, SALES, §§ 144, 602.

[28] AMES, CASES IN EQUITY, 524, note 2, for collection of cases. See also POMEROY, EQUITY, vol. 5, § 497, and note 26.

the defendant is solvent and threatens injury to personal property having no special or peculiar value, the legal remedy ordinarily affords complete relief in that the plaintiff can take the sum of money recovered from the defendant and with it put himself in the same position he occupied before the wrong was done.[29] But if the defendant is insolvent the court of equity should grant whatever relief may be necessary in order to protect the plaintiff.[30] The test of the inadequacy of the legal remedy should be the same whether the case involves a contract or a tort, that is, what will be the position of the complainant after availing himself of the legal remedy? In either case, in order to be adequate, such a remedy should, in the case of a contract, put the complainant in practically the same situation as if the contract had been kept, and, in the case of a tort, as if the wrong had not been done. Equity should not be satisfied with any less relief.[31]

Though the remedy is just as inadequate in one class of cases as the other, in a case involving a tort no third person is injuriously affected or his rights prejudiced by the granting of the equitable relief; while in cases which arise out of contract, though the relief given to the plaintiff in the law court is just as inadequate as in a case involving a tort, yet it may often be the situation that the equity court cannot grant specific performance to the person applying for relief without bringing an injury upon or disregarding the rights of many other persons who stand in positions exactly similar.

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[29] Burgess *v.* Kattleman, 41 Mo. 480; Brown *v.* Reed, 72 Neb. 167, 100 N. W. 143; Mahoney *v.* Stewart, 123 N. C. 106, 31 S. E. 384; Kistler *v.* Weaver, 135 N. C. 388, 47 S. E. 478; Marshall *v.* Homier, 13 Okla. 264, 74 Pac. 368.

[30] West *v.* Smith, 52 Cal. 322; Williams *v.* Carpenter, 14 Colo. 477, 24 Pac. 558; Milan Steam Mills *v.* Hickey, 59 N. H. 241.

[31] Cases often cited for the broad proposition that the legal remedy is not so inadequate that equity should take jurisdiction merely because it fails to produce the money, concern questions of taxation and are based upon entirely different principles. In Crawford *v.* Bradford, 23 Fla. 404, 2 So. 782, complainant sought to recover sums claimed to have been illegally collected by the defendant, who is insolvent. The proper action was *quo warranto* to test whether the defendant held office illegally. In other cases the question has been as to the power of equity to collect taxes when the legal remedy has not yielded results because no officer could be found to accept the office of collector. Thompson *v.* Allen Co., 115 U. S. 550; Rees *v.* Watertown, 19 Wall. (U. S.) 107; Safe-Deposit, etc. Co. *v.* Anniston, 96 Fed. 661; Preston *v.* Sturgis Milling Co., 183 Fed. 1; see also 32 L. R. A. (N. S.) 1020, note. In such cases the refusal of equity to grant relief is based on the fact that "taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is to apply to the legislature, which alone can grant relief." Meriwether *v.* Garrett, 102 U. S. 472.

Though the courts seem to have been much more willing to grant relief in cases involving threatened injury to property than in specific performance of contracts, the basis of jurisdiction is not different; but the nature of the case may have a strong bearing upon the question whether jurisdiction should or should not be exercised.

A class of cases where the granting of equitable relief is dependent upon the question of solvency or insolvency, but which is based upon an entirely different theory, is that in which an insolvent plaintiff asks specific performance. Though the question of insolvency is an important factor in determining whether relief should be given, the principle involved is in no way connected with the question of insolvency as a basis for specific performance. The question is purely one of mutuality of performance. Equity will either undertake to have the whole contract performed or else it will take no action whatever. The court will not aid an insolvent complainant to get property for which he bargained without at the same time getting the purchase money for the vendor. "Specific performance will not be given to one party unless specific performance by the other party is assured." [32]

A relief equitable in its nature [33] is often allowed against an insolvent defendant who has either misrepresented his financial condition or who, being insolvent, has bargained for goods without intending to pay for the same, or one whose financial condition is such that it may be inferred that he had no reasonable belief that he could pay and must, therefore, have intended to defraud the other party out of the goods or the price.[34] A similar situation exists where deposits have been received by an insolvent bank. In each case the remedy is based upon rescission for fraud, and not, as has been suggested,[35] upon the mere insolvency of the defendant. What constitutes the fraud is not material if the party asking relief has been led into the bargain by the fraudulent conduct of the other party. In such cases the time element may be very material, and the latest creditors may be given what would seem to be a preference; but the later creditors have the advantage only in so far as the time when the obligation was entered into may suggest the question of fraud, that is, the question as to whether the defendant had pur-

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[32] Dean Ames in 3 COL. L. REV. 1.

[33] WILLISTON ON SALES, §§ 567, 647.

[34] German National Bank *v.* Princeton State Bank, 128 Wis. 60, 107 N. W. 454. See also WILLISTON ON SALES, § 637.

[35] 18 HARV. L. REV. 454.

chased the goods or received the deposit while insolvent so that the question of insolvency may be used to show that at the time he could have had no reasonable expectation of paying and may therefore be considered to have intended to defraud the other party to the bargain. In other words, if he has purchased goods with an intention to defraud the other party out of them because, being insolvent, no recovery could be had against him, then relief may be had on the doctrine of rescission for fraud. The remedy by rescission, though based upon an equity doctrine, is a reason entirely apart and distinct from insolvency as a basis of equitable relief.

Agreements for the giving of security present a class of cases where relief by way of specific performance is given in equity against an insolvent defendant not necessarily because of insolvency, but rather because of the possibility of it. Such agreements are ordinarily specifically enforceable since the thing bargained for cannot be replaced with money damages. The plaintiff contracts for protection, and no adequate estimate can be made of the difference between a claim secured and one unsecured, for, when the security is needed, the plaintiff may not at that time be able to recover anything from the defendant. "It must always be problematical what the promisee's pecuniary injury is. The problem depends on the value of the security and the solvency of the debtor at the time when the debt is due." [36]

If specific performance of a contract to give security would be granted because of the fear of insolvency, it ought not to be refused if the situation the very possibility of which makes the legal remedy inadequate is already a certainty when the aid of equity is asked. If the contract would have been enforceable in the absence of insolvency, the court may very properly look to see whether the rights of third parties, usually other creditors, will be prejudiced by giving specific performance to the plaintiff when the defendant is insolvent. Here the plaintiff is not asking for a right which others similarly situated would not get, but is putting his case upon the ground that when he performed his part of the contract he was entitled not merely to a chose in action but to security: he has bargained to be a preferred or secured creditor and is therefore in a different class from the ordinary creditors who have advanced either money or goods without bargaining for such protection and solely in reliance

[36] WILLISTON ON SALES, § 139.

upon the general solvency of the defendant.[37] It is too broad a statement to say that specific performance will necessarily be granted in every case involving a contract to give security, for though in most cases damages may be problematical to a sufficient degree to make the action of the equity court proper and necessary, yet there may undoubtedly be many situations where the legal remedy will be practically sufficient so that equity should not act because of the theoretical inadequacy of the legal remedy. In suits for specific performance of such agreements, therefore, the insolvency of the defendant would be not merely an important but really the determining factor in the exercise of jurisdiction.[38] The complainant who has thus advanced his money upon the credit of particular goods does not expect or intend to become a general creditor; but if specific performance is refused he will become such, with the result that he is forced into an entirely different bargain from that which he contemplated. If specific performance were not granted in such a case the creditors, who have not bargained for security, would be unjustly enriched at the expense of the lender and would improperly share in his property.

On a similar basis equity allows relief by way of set-off when the legal remedy is inadequate. Though the plaintiff may have contracted because of having a set-off as security and has not relied upon the general credit of the other party,[39] yet it is only when the fact of insolvency or other sufficient cause makes apparent the inadequacy of the recovery of a judgment in a law court that equity takes jurisdiction to grant relief.[40] Insolvency here appears as the

[37] Columbia, etc. Co. *v.* World's Columbian Exposition, 85 Ill. App. 369; Sullivan *v.* Tuck, 1 Md. Ch. 59.

[38] *Ex parte* Masterman, 4 L. J. Bankr. 54; Shockley *v.* Davis, 17 Ga. 177; Rothholz *v.* Schwartz, 46 N. J. Eq. 477, 19 Atl. 312.

[39] Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599: "To warrant the interference of equity, there must be circumstances from which it can be inferred that one debt was contracted on the faith of the other." Porter *v.* Roseman, 165 Ind. 255, 74 N. E. 1105: "In enforcing an equitable set-off the court proceeds upon the principle that one demand is, *pro tanto*, a satisfaction of the other, and that the real indebtedness is merely the balance." To the same effect, Printy *v.* Cahill, 235 Ill. 534, 85 N. E. 753.

[40] Machado *v.* Borges, 170 Cal. 501, 150 Pac. 351; Hahn *v.* Gates, 102 Ill. App. 385; Cummins *v.* White, 4 Blackf. (Ind.) 356; Keightley *v.* Walls, 24 Ind. 205; Blackwell *v.* Oldham, 34 Ky. 195 (4 Dana); Patterson *v.* Woolridge, 170 Ky. 748, 186 S. W. 639; Wolff *v.* Jasspon, 126 Mich. 11, 85 N. W. 260; Gemmell *v.* Hueben, 71 Mo. App. 291; Hewitt *v.* Kuhl, 25 N. J. Eq. 24; Reed *v.* Bank of Newburgh, 1 Paige (N. Y.), 215; Lindsay *v.* Jackson, 2 Paige (N. Y.), 581; Armstrong *v.* McKelvey, 104 N. Y. 179, 10 N. E. 266; Mitchell *v.* Holman, 30 Ore. 280, 47 Pac. 616.

prime factor inducing equity to act in saving to the creditor the position to which he is entitled and thus preventing him from being placed along with the general creditors of the insolvent debtor.[41] To give specific performance of such an agreement is not failing to observe the principle of equality in equity, but is giving to a particular plaintiff that which he has specially secured to himself.

Where money is advanced for which a mortgage or security on after-acquired goods is to be given,[42] the protection of the rights of other creditors does not require the refusal of specific performance to the lender. Here is a situation which would ordinarily be enforceable in equity, and it does not become any the less so because of the insolvency of the defendant, and the same arguments which apply when there is an agreement to give security on goods now owned would apply with equal force if the goods were to be afterwards acquired. The one who has bargained for the special security ought not to be put along with the other creditors who have relied only upon the general credit of the other party any more in one case than in the other.

Sales dependent upon concurrent conditions, sometimes spoken of as "cash sales" or as "sales over the counter," present a situation where insolvency alone should induce equity to exercise its jurisdiction to grant specific performance. Here title is to be transferred only when the price is paid and, as in contracts involving security, neither party intends to rely upon the general credit or solvency of the other. If the seller in such a case has given over his goods but has not received the purchase price, the insolvency of the buyer ought not to throw this seller in with the general creditors, since an exact exchange was contemplated; the seller should either be allowed to recover back his goods or force the buyer to perform the conditions on which he received them. To force the seller to assume a position as a general creditor is putting him in a situation which he never agreed to occupy, and would be in effect making a new contract for him for the benefit of those, who, by their contracts or by the nature of their legal rights, are made to rely upon the buyer's general solvency, thus receiving an enrichment to which they are not entitled.

If the plaintiff, on the other hand, is the buyer and has paid over

41 Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053.

42 Holroyd *v.* Marshall, 10 H. L. C. 191.

money to the defendant with the understanding that the payment of the money and the transfer of the title to goods were to be concurrent conditions, then the same situation arises; and whether the plaintiff has advanced money or goods, equity can give relief at a time when the legal remedy is inadequate. On the other hand, failure to give relief would result in a benefit to the general creditors by putting this plaintiff into a class with others whose rights rest upon an entirely different foundation. The plaintiff having entered into a bargain which is in no way dependent upon the general solvency of the defendant, the equity court should give him protection and should not allow his property to be taken or the other creditors to be unjustly enriched at his expense. The legal remedy being inadequate, and the plaintiff being in a class different from that of the general creditors, there is a direct obligation which equity can compel to be specifically enforced without prejudice to the rights of general creditors, at least so long as the defendant's estate may be said to be increased by the plaintiff's property so that the general creditors would be unjustly enriched if they were allowed to share therein.

Confusion may arise in failing to distinguish between sales actually based upon concurrent conditions and what are often also spoken of as cash sales, that is, sales where no period of credit is contemplated but the parties intend to pass title to the goods and to get at once a right of action for the purchase price. Here all other creditors are in the same situation and should be treated alike. This case does not differ from the case of sale on credit for a specified period, since in either case the parties intended to rely only upon the general solvency of the defendant.

When a buyer has advanced the whole or a portion of the purchase price on the security of particular goods, or goods to be purchased or produced which are then to be sold to him, he should be entitled to relief as in the cases where a loan has been made under an agreement for security or where goods have been bargained for subject to concurrent conditions. The vital question in each case is: Has the complainant dealt in reliance merely upon the general credit of the defendant or has he made such a bargain as should entitle him to the position of a special or secured creditor? When specific performance is given under such circumstances, no injury results to other creditors, if the original agreement was proper, since the

complainant is not in the same position and should not be classed with the general creditors. The exact position which a particular creditor has secured for himself is a question of fact dependent upon the reliance which has been placed upon the performance by the defendant. The complainant may or may not have relied upon the mere general credit and solvency of the defendant, and if he has not contracted, either expressly or impliedly, for any special protection, of course none should be given him; but it would be just as improper to refuse a complainant the protection for which he had bargained, as to prefer one creditor over another when all have relied only upon the general solvency of the defendant.

Whether the situation of the complainant was that of buyer or seller should, theoretically, make no difference, and any bargain for security clearly made out should be enforced; but, practically, the cases causing difficulty are those where money is advanced for the payment of goods. This difficulty is purely one of fact, to determine whether in the particular case reliance was placed merely upon the general credit and solvency of the seller or whether the basis of the advancement of the money was the security of the particular goods which were to be later transferred to the buyer, whether such goods are already owned by the seller or are yet to be produced or procured. If the goods are already owned by the seller and in condition for delivery, it may be very difficult, in the absence of express contract, to infer that the parties intended anything other than reliance upon the general credit of the seller for securing performance of the contract;[43] but where the buyer has advanced the whole or a portion of the purchase price for the express purpose of making possible the procuring or producing of the goods by the seller so that he may, with the goods thus secured, perform specifically his obligation to the buyer, it may easily be inferred that the buyer was intended by the bargain to hold some position with reference to such goods different from that of the general creditors

[43] In such a case as Hendry *v.* Whidden, 48 Fla. 268, 37 So. 571, where the complainant paid in advance the purchase price of a number of cattle, it did not appear that the money advanced was to be used for the purpose of procuring the cattle with which the defendant was to fulfill his contract to the complainant. If reliance was placed merely on the general credit of the defendant, then the complainant should not be entitled to specific performance unless the situation was such that there were either no other creditors or none whose rights would be materially affected by the granting of relief. See also, McLaughlin *v.* Piatti, 27 Cal. 451; Cincinnati, etc. R.R. Co. *v.* Washburn, 25 Ind. 259; Gillett *v.* Warren, 10 N. Mex. 523, 62 Pac. 975.

of the defendant. Realization of this fact has led the courts, in attempting to give proper protection to the buyer's position, to describe the relationship thus created between the parties as one of trust or pledge or mortgage.[44] However the rights of the parties may be worked out to give the complainant the relief to which he is entitled, the true situation seems to be merely one where equity has jurisdiction because of the inadequacy of the legal remedy brought about by the insolvency of the defendant, and where, because of the special bargain which the complainant has made, equity is in a position to exercise such jurisdiction without injuring in any way the rights of the general creditors.

It is submitted, therefore, that insolvency is a proper ground upon which equity may grant equitable relief by way of specific performance of a contract. The legal remedy giving judgment for a money sum cannot be considered adequate against an insolvent person, no matter how perfect it may be against a solvent defendant; and equity will give relief on the ground of the defendant's insolvency whenever this can be done without injury to third persons.[45] Since, however equity will not give relief to one person to the prejudice of others similarly situated, the cases involving contract relations where equitable relief is given against insolvent defendants are not numerous; but where, as is the usual situation in cases involving torts, the relief can be given to the plaintiff, without at the same time prejudicing the rights of others, the insolvency of the defendant bringing about an inadequacy of the legal remedy may be the sole ground upon which equity may be induced to exercise its jurisdiction.

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[44] Hurley *v.* A. T. & S. F. Ry., 213 U. S. 126. Here money was advanced by a railroad company to a coal company in order to enable the latter to carry out its contract to furnish coal to the former, as the coal company was insolvent and unable to operate its mine. The court said, "The inevitable meaning of the new arrangement . . . was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made." See also, Parker *v.* Garrison, 61 Ill. 250; Ridenbaugh *v.* Thayer, 10 Idaho, 662, 80 Pac. 229; Sullivan *v.* Tuck, 1 Md. Ch. 59; Livesley *v.* Johntson, 45 Ore. 30, 76 Pac. 13, 946; Livesley *v.* Heise, 45 Ore. 148, 76 Pac. 952.

[45] In cases involving the Statute of Frauds the refusal of equity to grant specific performance has no bearing on the question of insolvency as a basis of jurisdiction, for, whether the legal remedy is inadequate because of the character of the property or the financial condition of the defendant, the proposition before the court is the observance and enforcement of the provisions of the statute rather than any question of the adequacy or inadequacy of the legal remedy. Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391; Townsend *v.* Fenton, 32 Minn. 482, 21 N. W. 726.

Jurisdiction to grant relief and the exercise thereof are entirely different propositions: and though the inadequacy of the legal remedy against an insolvent debtor gives a proper basis upon which equity might in every case take jurisdiction, there still remains the question as to whether in the exercise of a reasonable discretion the jurisdiction should be exercised. This discretion is influenced or controlled here by the same rules which govern in other cases of the exercise of jurisdiction, and especially applicable is the principle that relief will not be given to a party complainant, even though he is otherwise entitled, when to do so would cause injury to others similarly situated or equally entitled to protection.

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